BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WENDY NICHOLE BIGGER Claimant V. **WESLEY MEDICAL CENTER** Respondent AND **ACE AMERICAN INSURANCE COMPANY** Insurance Carrier	))))))))))	Docket No. 1,063,962

ORDER

Respondent requests review of the June 24, 2013 preliminary hearing Order. Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The preliminary hearing Order indicates claimant sustained injury by repetitive trauma that arose out of and in the course of her employment, with a December 11, 2012 date of injury. The preliminary hearing Order further indicated the repetitive trauma was the prevailing factor in causing claimant's injury and notice was timely.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the March 26, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to prove personal injury by accident or repetitive trauma arising out of and in the course of her employment and notice was untimely. Respondent requests the Board reverse the preliminary hearing Order and deny benefits. Claimant maintains the preliminary hearing Order should be affirmed.

The issues for the Board's review are:

(1) Did claimant sustain personal injury by repetitive trauma arising out of and in the course of her employment?

(2) Did claimant provide timely notice to respondent?

FINDINGS OF FACT

Claimant began working for respondent on January 23, 2012, as a Certified Nursing Assistant (CNA). Before working for respondent, she passed a January 16, 2012 preemployment physical in which Donna St. Clair, D.O., noted claimant had "no abnormalities on physical exam."[1]

Claimant's work required her to repetitively bend, lift, roll and move patients. Her job duties included helping patients ambulate, use the bathroom, get out of bed and change their clothes. In the course of her work, claimant developed low back symptoms. She could not pinpoint when her symptoms started, noting that they came on gradually, without specific trauma. Claimant denied any preexisting low back problems.

Claimant testified that she initially believed her symptoms were just normal soreness and back pain from her job duties, but knew by mid-February 2012 she had more than just muscle pain because she had muscle spasms with a deep stabbing and burning pain radiating down her right leg.

In late-February 2012, claimant underwent EKG training for about two weeks, which required her to sit at a desk and watch monitors. Claimant was seen by Paul Brackeen, D.C., on February 29, 2012. Claimant knew her symptoms were due to her work duties. By this time, she had been doing EKG training for about one week. Dr. Brackeen noted:

> Patient works at Wesley as a CNA. She states that she has been moving and lifting patients since the last 6 weeks she has been there but recently she moved to the EKG and sits at a desk. Getting up is painful and walking is painful and it gets worse the more she moves. She has past x-rays showing decreased disc in lumbar spine.

Claimant resumed working as a CNA. After chiropractic visits failed to provide relief, claimant sought treatment through her primary care physician, Norman Koehn, M.D., in March 2012. Dr. Koehn had her undergo an MRI, which showed a lumbar disc herniation.

Dr. Koehn referred claimant to Michael Chang, M.D., in April 2012. Dr. Chang recommended a laminectomy and discectomy. Dr. Goel administered an epidural injection in claimant's back, which provided some relief. She continued her regular duties.

Claimant testified that in March or early-April 2012, in any event after the MRI, she told her supervisor, Robin Davis, that she had a herniated disc which she believed was related to her work duties.[2]

---

[1] P.H. Trans., Cl. Ex. 3 at 7.

[2] *Id.* at 31-32.

On June 4, 2012, claimant was helping a patient ambulate. The patient was leaning on her. Claimant's back "seized up" and she was unable to walk.[3] She was taken by coworkers to the emergency room and diagnosed with acute low back pain. She was given pain medications and told to take it easy for a few days. At some unknown point, claimant returned to regular duty. Claimant testified that she told Ms. Davis about this incident.

Following this incident, claimant indicated her back pain was "back to square one." She was still under the care of Dr. Chang and received another epidural injection from Dr. Goel, which provided temporary relief.

On December 11, 2012, claimant was bending over taking vitals on a patient when her back seized up when she straightened up. She was again taken by coworkers to the emergency room where she was diagnosed with a lumbosacral strain and prescribed pain medication. Claimant testified she told Ms. Davis about this incident and tried to get workers compensation benefits.[4] Ms. Davis directed claimant to Nancy Rosales[5] in human resources. Claimant was taken off work for the rest of the week.

On December 17, 2012, claimant presented a letter to respondent notifying them that she was claiming workers compensation benefits.

Respondent referred claimant to New Medical Health Care, where she was evaluated by Angela Moore, D.O., on December 18, 2012. Dr. Moore noted the prevailing factor was the "Work injury consistant [sic] with physical findings, Patients [sic] pre existing [sic] status contributed to recent injury, There is a known previous relevent [sic] injury." It appears Dr. Moore focused on a December 11, 2012 accident only, and not repetitious injury over time, while claimant testified that she told Dr. Moore about her back problems that began when she started work for respondent. Dr. Moore gave claimant work restrictions of limited lifting to 10 pounds and no repetitive bending/squatting/stooping or twisting. Claimant testified these were her first work restrictions.

Claimant's last date of work was January 18, 2013. On that day, Ms. Rosales advised claimant her injury was not work related and respondent would no longer accommodate her work restrictions.

On January 23, 2013, claimant filed an application for hearing alleging accidental injuries on June 4, 2012; December 11, 2012; and each working day from January 23, 2012 through January 18, 2013.

---

[3] *Id.* at 12.

[4] *Id.* at 17-18, 40.

[5] While the preliminary hearing transcript refers to Nancy "Rosalas," the Division of Workers Compensation's January 25, 2013 email to Wesley Medical Center lists her last name as "Rosales."

In his January 24, 2013 letter to respondent, Dr. Koehn addressed causation:

> . . . Her symptoms I believe are related to her work as a CNA. Her duties do involve repetitive lifting of patients and repetitive bending. Her symptoms came on gradually, but she had an acute exacerbation on [or] about January 23, 2013. . . . Her symptoms again deteriorated on December 11, 2012, when she was leaning over a patient and twisted. She had an additional flare-up on June 4, 2012, when she was assisting a patient while walking. . . .
>
> It is my medical opinion that [claimant's] current need for treatment and her current limitations for work are a result of her work at Wesley Medical Center.

Claimant denied any exacerbation on January 23, 2013. She had another lumbar MRI in February 2013. Such report is not properly in evidence.[6]

The preliminary hearing was held March 26, 2013. Claimant testified she believed her problems were work related:

> Q. Now, when you saw Dr. Brackeen did you believe that your problems were related to our work?
>
> A. Yes.
>
> Q. Okay.
>
> A. But at that time they, they had come on so slowly.
>
> Q. When you saw Dr. Brackeen, you thought it was related to work so you thought it was related to an injury; is that correct?
>
> A. Well, I didn't know if it was related to an injury, there wasn't any specific point in time in which I thought, oh, my back hurts because of this. I thought it was simply due to wear and tear.
>
> Q. Wear and tear of?
>
> A. Of my back related to my work duties.
>
> Q. So you thought your back problem was related to your work duties?
>
> A. Yes.[7]

---

[6] Claimant sent the Board her February 8, 2013 MRI report and Dr. Koehn's April 3, 2012 records. Such records were not properly placed into evidence and are not being considered by the Board.

[7] P.H. Trans. at 29-30.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(b) states the employer is liable to pay compensation when an employee suffers personal injury by accident or repetitive trauma arising out of and in the course of employment. "In the course of" employment relates to the time, place, and circumstances under which the accident occurred, and means the injury happened while the worker was at work in the employer's service. "Out of" the employment points to the cause of the accident and requires a causal connection between the injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[8] The claimant carries the burden of proof.[9]

K.S.A. 2012 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
>
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

---

[8] See *Hormann v. New Hampshire Ins. Co.,* 236 Kan. 190, 197-98, 689 P. 2d 837 (1984).

[9] K.S.A. 2012 Supp. 44-501b(c).

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-520 states in part:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; . . . .

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

"When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction."[10]

ANALYSIS

Dr. Koehn observed in his January 24, 2013 letter that claimant's back pain and radiculopathy were related to her repetitive lifting and bending, and her need for medical treatment and work limitations were due to her work duties. Claimant proved injury by repetitive trauma. There is no proof of a low back injury predating her work for respondent. Her symptoms gradually progressed with her job duties, which were an increased employment risk or hazard to which she was not exposed in normal non-employment life. While Dr. Koehn did not use the term "prevailing factor," the current record demonstrates claimant's work activities were the cause of her injury.

Dr. Brackeen's initial report noted that claimant getting up and walking was painful. However, claimant did not allege that such activities caused her injury, and no medical evidence establishes that claimant's repetitive injury was due to such activities.

Claimant established a lesion or change in the physical structure of her body. The evidence demonstrates that claimant has a herniated lumbar disc. While Dr. Brackeen's records mention a prior x-ray showing decreased disc space in claimant's lumbar spine, there is no evidence claimant's herniated disc predated her work for respondent or was a preexisting condition.

Claimant testified that she repeatedly provided notice to her supervisor. To determine if notice was timely, the date of injury by repetitive trauma must be determined. The date of injury by repetitive trauma is a legal fiction.[11] Claimant needed to provide notice within 20 days from seeking medical treatment for her injury by repetitive trauma or 30 days from the date of injury by repetitive trauma, whichever came first. The Appeals Board has interpreted the 20 days notice requirement as 20 days from the date claimant sought medical treatment for the repetitive trauma injury after the date of injury by repetitive trauma has been established under K.S.A. 2012 Supp. 44-508(e).[12]

---

[10] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[11] See *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 615, 256 P.3d 828 (2011); *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

[12] See *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sep. 19, 2012).

In looking at events that statutorily affix a date of injury by repetitive trauma, the claimant was not taken off work by a physician due to the diagnosed repetitive trauma. Dr. Moore provided claimant restrictions on December 18, 2012, but there is no showing such restrictions were due to any diagnosed repetitive trauma. While Dr. Moore's December 18, 2012 report states claimant's condition was work related, this Board Member cannot tell if Dr. Moore actually advised claimant that her condition was work related. The only factor that definitively affixes a date of injury by repetitive trauma is claimant's last day worked, January 18, 2013.

Claimant provided notice several times, both to Ms. Davis and Ms. Rosales, before January 18, 2013, and by filing her application for hearing with the Director of Workers Compensation on January 25, 2013. Notice may be provided prior to claimant's legal date of injury by repetitive trauma.[13]

Claimant's belief, feeling or awareness that her work caused her injury by repetitive trauma, and the fact that she discussed with Dr. Brackeen what she believed to be the cause of her injury, does not create a date of injury by repetitive trauma.[14] The notice requirement does not start to run until a date of injury by repetitive trauma has occurred. The fact that claimant sought medical treatment prior to her legal date of injury by repetitive trauma does not trigger a date of injury by repetitive trauma, such that notice was untimely.

CONCLUSION

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes:

1. Claimant sustained an injury by repetitive trauma arising out of and in the course of her employment with respondent.

2. Claimant's date of injury by repetitive trauma was claimant's last day worked, January 18, 2013. Therefore, timely notice was provided.

---

[13] See *Boyce v. Blackbob Pet Hospital, Chtd.*, No. 1,061,806, 2012 WL 6811299 (Kan. WCAB Dec. 18, 2012) and *Whisenand v. Standard Motor Products, Inc.*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012); see also the application of the predecessor statute in *Hunt v. Integrated Solutions, Inc.*, No. 1,046,939, 2010 WL 1918584 (Kan. WCAB Apr. 14, 2010) ("Admittedly, it seems unusual to conclude an injured employee gave notice of an accident that had yet to occur. Yet, that is a function of the legal fiction that results in cases of microtraumas and the terms of K.S.A. 44-508(d).").

[14] *Smith v. Atriums Management Co., Inc.*, No. 1,063,210, 2013 WL 2455717 (Kan. WCAB May 16 2013).

DECISION

WHEREFORE, the undersigned Board Member modifies the June 24, 2013, preliminary hearing Order by finding claimant's date of injury by repetitive trauma was January 18, 2013. The remainder of the preliminary hearing Order is affirmed.[15]

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Brian D. Pistotnik
brianpistotnik@pistotniklaw.com

Anton C. Andersen
aandersen@mvplaw.com
mvpkc@mvplaw.com

Honorable Nelsonna Potts Barnes

[15] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.